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No. 09-143

Supreme Court, U.S.
FILED
AUG 28 2009
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

HUDSON AREA SCHOOLS,

Petitioner,

v.

DAVID PATTERSON and DENA PATTERSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a school district is entitled to summary judgment as a matter of law on the issue of deliberate indifference to known severe, pervasive, and objectively offensive student-on-student sexual harassment under *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), where the underlying material facts are in dispute; where taking the evidence in a light most favorable to the non-moving party, the evidence shows the district had knowledge that its remedial actions were ineffective in the face of the continuing harassment, yet the school district continued to use the same ineffective methods; and, where the school district failed to follow its own policies.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption. Respondents are not corporate entities and are not a subsidiary or affiliate of a publicly owned corporation.

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STATEMENT OF THE CASE

A. The Claim

On November 24, 2005, Respondents, as next friend of Dane Patterson[1], filed a complaint alleging a violation of rights granted to Dane under Title IX of the Education Amendment of the Civil Rights Act of 1972, being 20 U.S.C. § 1681, *et seq.* The complaint alleged a multi-year history of bullying, teasing, and sexual harassment sufficiently severe and pervasive to deny Dane access to the educational opportunities or benefits provided by Hudson Area Schools ("Petitioner"). (Complaint, Sixth Circuit Joint Appendix, *hereafter "JA"*, pg. 12, ¶6, ¶25).

B. Course of Proceedings

Petitioner filed for summary judgment on April 18, 2007. Respondents filed a response on May 9, 2007. The district court issued its Opinion and Order November 28, 2007, finding as to the Title IX claim, (1) Respondents had met their burden as to the first prong of the *Davis*[2] test (i.e. severe, pervasive and objectively offensive conduct), (JA-pgs. 321-323); (2) Petitioner had knowledge of multiple instances of student-on-student sexual harassment of Dane, (JA-pgs. 323-324); but (3) Petitioner was not deliberately indifferent to the sexual harassment against Dane, because its actions were not

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[1] Hereafter referred to as "Dane"

[2] *Davis v. Monroe County. Bd. of Educ.*, 526 U.S. 629, 653; 119 S.Ct. 1661; 143 L.Ed. 2d 839 (1999).

clearly unreasonable in light of known circumstances. (JA-pgs. 324-330).

Respondents appealed to the Sixth Circuit Court, which reversed January 6, 2009. Petitioner's motion for *en banc* review and/or reconsideration was denied May 1, 2009. The essence of the decision of the Sixth Circuit was material issues of fact remain and that summary judgment was inappropriate pending resolution of those factual issues.

C. Counter-Statement of Issue

Contrary to Petitioner's claim, the Majority Opinion[3] in the Sixth Circuit found the facts proffered by Petitioner, as "effective responses to complaints of harassment, policies prohibiting harassment, and instituting programs teaching the students the danger of harassment" (Petition, pg. 2), were in dispute which must be resolved at trial. *Patterson v. Hudson Area Sch.*, 551 F.3d 438 (6th Cir. 2009). The court *did not* require schools to "remedy" all offensive behavior, but instead questioned claims of undisputed factual assertions offered by the Petitioner. The Majority did not alter the holding of this Honorable Court in *Davis*, nor is it inconsistent with its own holding in *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253 (6th Cir. 2000).

Just as in the Sixth Circuit, Petitioner submits a pleading in which the offered statement of fact is replete with references not cited to the record, contains

[3] Hereafter "Majority"

numerous factual, errors cites to references which do not support the claimed fact, or take one fact from one academic year and apply it to multiple years. From pages 5-9, there are at least sixteen factual claims not supported by a citation to the record.

D. Factual Disputes

The following is a list of some significant factual contradictions:

1. Petition, pg. 3: Petitioner claims all perpetrators, once identified, were disciplined. The record fails to show any perpetrator named in 6th and 7th grades was disciplined. *Infra* at 11-12. Most perpetrators in 9th grade, especially the daily harassers, also went undisciplined. *Infra* at 14-18. Unless Respondents had corroborating evidence, Petitioner refused to take action. (See example, JA-pg. 714). Rather than support Dane, Petitioner's staff discouraged complaints with responses such as (1) "kids will be kids", (2) "addressing things will only make it worse", (3) "we don't have enough proof and can't do anything about it", and (4) "are you sure you want me to do something with these kids because of the retaliation factor". (Dane, JA-pgs. 672, 704-705, 714; David Patterson[4], JA-pgs. 802-803). According to Dr. Warwick, Dane's counselor, the Petitioner treated Dane "as if he was the problem". (JA-pg. 174, ¶28).

[4] Hereafter referred to as "David"

2. Petition, pg. 3: Petitioner claims a proactive and vigorous history of investigation and disciplinary responses to sexual harassment. Respondents disagree.

   a. Contrary to its own policy (Code, JA-pg. 309), Petitioner did not call the police after Dane was sexually assaulted, refusing Dane's request for Petitioner to call so he would not bear that burden and the issues it presented. (Dena Patterson[5], JA-pgs. 865-866). The police report confirms Dena is the complainant. (JA-pg. 259).

   b. Petitioner's records demonstrate only *one* set of investigative notes or reports for the three year period of harassment and only in relationship to the sexual assault. (JA-pgs. 263-265). This lack of reporting undercuts any claim of vigorous investigation.

   c. As to the defacement of Dane's main locker, *Infra* at 16, Dane provided names of two potential perpetrators, Derrick G. and Kyle M. (Dane, JA-pgs. 712-715). While conducting his "vigorous" investigation, Assistant Principal Durbin never bothered to interview either student. (Durbin, JA-pg. 433).

   d. More often than not, Petitioner violated its own disciplinary policies, *Infra* at 11-15; 20-

[5] Hereafter "Dena"

24, thereby creating a perception within the student body that nothing would be done in response to bullying and harassment. *Infra* at 25-27.

3. Petition, pg 3: Petitioner's claim, that it provided multiple services, has been highly disputed by Respondents in the Sixth Circuit.

   a. As part of its legal duty to evaluate Dane for special education services, Petitioner conducted an evaluation during the summer after Dane's horrendous and devastating 7th grade year. (Cates, JA-pgs. 367-370; Dena, Appendix-pgs. 9a-10a). This event was a one-time reactive response to Dane's emotional deterioration, not a proactive measure. Nothing in the 8th or 9th grade Individual Educational Plan (IEP) directly addressed measures to protect Dane from harassment by using such things as a para-professional, an escort between classes, or special reporting procedures. (JA-pgs. 39-47, 216-224).

   b. Though Petitioner provided IEPs, the record clearly indicates Petitioner failed in their implementation for 9th and 10th grade. (Warwick, JA-pg. 173-176, ¶22-36).

   c. Susan Mansfield did not provide services to Dane as part of an IEP (JA-pgs. 39-47; 216-224), nor did she personally invite Dane to attend individual or group counseling

sessions. Rather, she made a generalized statement to 7th and 8th grade students informing them of available services. (Mansfield, JA-pgs. 470-471). *Ms. Mansfield acknowledged Dane not accessing those services was appropriate. (JA-pgs. 471-472). Further, Dane did not have the capacity to self-advocate, which precluded him from using services that required him to initiate contact.* (Warwick, JA-pg. 174, ¶29-31).

d. Petitioner's claim Dane was given preferential seating to avoid his tormentors is without merit. The 8th grade IEP (2003-2004) states: "Seating preference, if needed, extra time on tests, if needed." (JA-pg. 41). No reference is made anywhere in this IEP to that action being implemented for Dane to avoid harassers. *The 9th grade IEP makes no reference to preferential seating.* (JA-pgs. 216-224).

e. Respondents did not refuse services as alleged. Neither psychology nor counseling services were part of the IEP. (JA-pgs. 39-47; 216-224). Social work services were not designated as "group" on the IEP. (*Id.*). Tammy Cates testified a portion of Dane's permanent records were missing, including attendance records and complete interview notes. (JA-pgs. 371-372). Though the 8th grade IEP called for social work services two to four times per month (JA-pg. 42), Ms. Cates acknowledged missing

appointments and possibly cancelling "groups". (JA-pgs. 371-372, 380-381). Instead she relied on Dane, who could not self-advocate, *Supra* at 6, to be the primary initiator of services.

f. The Petitioner suggests Respondents did not cooperate in dealing with issues of sexual harassment and special education services. The facts are against Petitioner on this point. Susie Mansfield testified Respondents acted appropriately in relying on Dr. Warwick as Dane's primary mental health provider. (JA-pgs. 470-471, 508, 518-519). Dane's not accessing her group sessions was appropriate. (*Id.*). Ted Adams wrote Respondents fully cooperated with Petitioner regarding Dane. (JA-pg. 272). His testimony confirms this point. (Adams, Appendix-pgs. 1a-2a).

g. Petitioner asserts "Plaintiffs' parents refused to allow [Dane] to meet with the High School resource teacher." (Petition, pg. 10). *This unreferenced allegation* is false and contradicted by Dena, (JA-pg. 855), and the Adams' letter which states the *IEP team* decided against placing Dane in the resource room for 9th grade. (JA-pg. 271).

h. Petitioner's claim of providing resource room services to Dane for 9th grade is also misconstrued. Initially, Petitioner refused to allow Dane to be assigned to Mr. Adams in

9th grade in the manner assigned in 8th grade. (Dena, JA-pg. 855). Principal Osborne did not believe Dane should be in the resource room for 9th grade. (*Id.* at 856). After Respondents begged Mr. Osborne, he agreed to allocate 20-30 minutes each week for Dane to meet with Mr. Adams for consulting services, which were called "resource room" in the IEP. (Dena, Appendix-pgs. 10a-25a; Adams, JA-pgs. 339-340).

4. Petition, pg. 31: No evidence suggests "teachers agreed to be extra vigilant in looking after Dane." Sixth grade teachers did discuss with Respondents their intention to "observe the situation and try to handle it" (Dena, JA-pg. 813), however, such is far from "vigilance". No similar expression was rendered by 7th, 8th, or 9th grade teachers.

5. Petition, pg. 31: "Teachers" did not offer suggestions to help Dane better cope with his peer related problems. Rather, one 7th grade teacher, Scott Marry, suggested Dane seek out extra curricular activities, such as Science Olympiad, to help with socialization (JA-pg. 525), which Dane was already participating in. (David, JA-pg. 696).

6. Petition pg. 31: Though principal Rozeveld offered in 7th grade to help Dane, he ceased being available after the first day. (Dena, JA-pgs. 844-849).

7. The 8th grade IEP states: "Dane received below average grades in most academic subjects" (JA-pg. 40), which contradicts the Petitioner's claim that school records confirm Dane's grades were largely unaffected. (Petition pg. 7); (*cf.* Evaluation, JA-pgs. 32-33; Adams, JA-pgs. 271-273; Report Cards, JA-pgs. 201-203).

8. Petition, pg. 13: Petitioner did not "adopt several policies in response to the survey of 2002". Counselor Mansfield testified that every suggestion she made after the 2002 survey was rejected. (JA-pgs. 485, 488-495). No evidence established that the 2002 survey led to any action by Petitioner.

9. Petitioner did not initiate multiple programs from 2002-2005 aimed at combating harassment and bullying.

    a. Petition, pg. 17: Petitioner claims in 2002, it commenced the program "40 Developmental Assets" for staff, which had nothing to do with sexual harassment. (Osborne, JA-pg. 594).

    b. After Dane was sexually assaulted and permanently left campus (Johnson, JA-pg. 160, ¶36; Osborne, JA-pgs. 613-614), Petitioner, in the summer of 2005, started the Campaign for Kindness. (Dunn, JA-pg. 391-392). Bonnie Dunn was hired September, 2005. (Dunn, Appendix-pg. 7a).

c. Contrary to Petitioner's claim (Petition pg. 17), the undated, unsigned and unauthenticated document referenced, at JA-pgs. 80-81, does not support the claim that the "Character Counts" program was adopted in the 2003-2004 school year, nor is it referenced in that document.

d. *Petitioner's claim* it brought in a number of speakers from 2002-2005 to speak on issues of bullying and harassment *is misleading*. The record reflects most, if not all, of these speakers were brought in after Dane permanently left campus and Ms. Dunn's hiring in September. (Osborne, JA-pgs. 584-586; Dunn, Appendix-pg. 7a). Ms. Dunn testified speakers brought in by Petitioner included Mr. Jacoby (2005-06), Mr. Tournequist (2005-06), and Mr. Dunbar (2005-06), who spoke primarily on issues other than bullying or anti-bullying approaches. (JA-pgs. 395-397). Dr. Hinsley, a former NFL football player, spoke in 2005-06 about achieving dreams. (Johnston, JA-pg. 157, ¶13). Ms. Dunn indicated she was unaware of any speaker from the previous two years (2005, 2006) who had been specifically brought in to address bullying and harassment in the school environment. (JA-pgs. 397-398).

Respondents challenge Petitioner's claim of proactive approaches with their expert Glenn Stutzky, who opined Petitioner's methods were not proactive and

that its actions and claimed presentations while Dane was on campus ("Character Counts", "CATS", "Flirting and Hurting", "40 Developmental Assets", and "Bang, Bang, You're Dead") were not effective tools to address or remediate bullying and harassment. (Stutszky, JA-pgs. 283-286).

E. Background and Overview

1. Factual Background

Dane has experienced emotional and physical trauma related to severe and pervasive sexual harassment, which began in 6th grade and continued in 7th and 9th grades. (Warwick, JA-pgs. 170-175, ¶9-14, ¶17-21, ¶32-35; Herrick, JA-pgs. 188, 193). As a result, Dane has been psychologically unable to enter a Hudson Area School building, since May, 2005. (Warwick, JA-pg. 175, ¶33-35).

In 6th grade, Dane was frequently pushed in the hall and called names including *queer*, *faggot*, *gay*, and *pig*. The most frequent perpetrators were: (1) Joe R., (2) Zach W., (3) Jessie W., (4) Nick H., (5) Sabra W., (6) Sabin E., and (7) Kyle M. (Dane, JA-pg. 669). *These students were reported by Dane to the principal.* (*Id.* 670-672). The record does not disclose any disciplinary action for these perpetrators.

Throughout the 7th grade year, bullying and sexual harassment of Dane continued. (Dane, JA-pg. 673). Dane's experience with his peers included: (1) near daily name-calling (*fag, faggot, gay, fat pig, man boobs, big boobs*), (Dane, JA-pgs. 672-674, 752-753); (2) repeatedly

being called *Mr. Clean*, a sexually derogatory term referring to a lack of pubic hair, (*Id.* at 693); (3) frequent jostling and pushing in the hallways, (*Id.* at 754-755); and (4) being slapped by Brittany C. (*Id.* at 678). The primary perpetrators were the same ones identified in sixth grade and listed above. (*Id.* at 673). New offensive names surfaced including *fat* and *man boobs*. (*Id.* at 689-690). A new perpetrator, Brandon C., was also identified. (*Id.*). During the second semester the *Mr. Clean* connotation surfaced, (*Id.* at 692-693), with Jessie W., a named perpetrator of that incident. (*Id.* at 693). The pervasive name calling continued throughout the year (*Id.*), and *was reported to Principal Rozeveld, Counselor Mansfield, and teachers.* (See above; *Infra* at 19). The record does not disclose any disciplinary action for these perpetrators.

During 7th grade, Dane ate lunch alone in the band room to avoid the harassment. (Dane, JA-pgs. 689-690). Throughout the year, discussions occurred between Respondents and Petitioner's staff over poor academic performance, sexually derogatory name-calling, and other issues. (David, JA-pgs. 772-790, 792-806, 808; Dena, JA-pgs. 833, 839-843). Repeatedly, Petitioners asked what, if anything, Dane was doing to cause the teasing and taunting; each time Petitioner responded: "nothing". (David, JA-pgs 777-778; Dena, JA-pg. 833).

By the end of the first semester of 7th grade, Dane wanted to quit school. (David, JA-pgs. 785-786). Principal Rozeveld offered to mentor Dane to help with the struggles. *Mr. Rozeveld failed to follow through* after the first day, leaving Dane to cope for himself. (*Supra* at 8).

By the end of 7th grade, Counselor Mansfield was sufficiently concerned about Dane and contacted Lenawee ISD Social Worker Tammy Cates about a special education review. (Cates, JA-pgs. 367-368). Mrs. Mansfield and Ms. Cates filled out a referral form, which Mrs. Patterson signed. (Moeckel, JA-pgs. 576-577; Dena, JA-pg. 196, ¶3). *Respondents fully cooperated with the IEP process.* (Moeckel, JA-pgs. 573-574; Cates, JA-pgs. 369-370).

At the beginning of the 8th grade year, a Multi-Disciplinary Evaluation Team was convened to evaluate Dane for special education services. (JA-pgs. 204-205). The team found Dane to be emotionally impaired under the Individuals with Disabilities Educational Act, 20 U.S.C. § 1400, et. seq. (*Id.* at 204). An IEP Team (IEPT) was convened and a special education program developed. (IEP-8th, JA-pgs. 206-214). Dane was assigned to Mr. Adams' resource room *up to ten hours per week.* With the assignment of Mr. Adams for resource room services, Dane was able to cope with the 8th grade harassment and was able to learn. (Dane, JA-pgs. 694-695).

Dane's IEP plan was altered for the 9th grade year. (IEP-9th, JA-pgs. 216-224). Ted Adams was no longer available for resource room services, per Principal Osborne. (Dena, JA-pg. 854). However, Mr. Adams testified he began teaching high school resource room three years before his deposition, which would have been Dane's 9th grade year, (JA-pg. 346) Dane, per the IEPT's decision, remained in general education with minimal support. (IEP-9th, JA-pgs. 218-220). Mr. Adams served as a contact person for Dane for a total of 20 to 30

minutes each week. (Dena, JA-pgs. 856-857), but this was significantly less contact than in 8th grade.

In September of the 9th grade year (2004), the bullying and harassment experienced at the level of 7th grade resumed. (Dane, JA-pgs. 697-731). Immediately, Dane began to hear such words as *gay*, *fag*, *faggot*, and *queer* being directed at him. (*Id.* at 729-730). In addition the jostling, bumping, pushing and shoving in the hallways resumed. (*Id.* at 716-717). These things became multiple occurrences on a near daily basis. (*Id.* at 716-717, 729-730). Perpetrators were identified as: (1) Joe R., (2) Jeff L., (3) Cody F., (4) Jessie W., and (5) Sabin E. (*Id.* at 703). *Joe R., Jessie W., and Sabin E. were previously identified as perpetrators in 6th and 7th grade. Reports of these incidents were made by Dane to Principal Osborne.* (*Id.* at 703-705). The record does not disclose any disciplinary action for these perpetrators for these incidences.

In mid-September, the *Mr. Clean* label resumed, with an incident involving (1) Billy H., (2) Sheila C., and (3) Kelly W., (David, JA-pgs. 697-699), which brought back negative memories from 7th grade. (*Id.* at 698). Three persons were reported to Counselor Mansfield, who called these students into a meeting with Dane. These perpetrators apologized, but *no disciplinary action was administered,* (*Id.* at 702), since Mrs. Mansfield, as counselor, could not administer discipline. (Mansfield, JA-pg. 500). Instead, they were sent back to class. (*Id.* at 514). *School policy required referral to administrators.* The 2004 policy on bullying, which included harassment, funnels all complaints to

administration. (JA-pg. 277). The Student Code of Conduct[6] requires sexual harassers to be sent to the principal. (JA-pg. 306).

On December 10, 2004, Dane's daily planner was defaced in class with sexually derogatory slurs–"I love penis", "I lick it in the ass"–and sexually explicit drawings of a buttock and penis (Dane, JA-pgs. 721-724) by Joe R. (*Id.* at 717-718) and Jeff L. (Osborne, JA-pg. 597). *Dane reported the incident to the office.* (Dane, JA-pgs. 721-724). *This was not Joe R.'s first incident* which Dane reported to Respondent. (*Supra* at 11-15). Both students received a verbal reprimand from Mr. Osborne. (JA-pgs. 597-598).

A second *Mr. Clean* incident occurred on December 14, 2004 involving Kyle M. and Jeff L. (Osborne, JA-pg. 598; Dane, JA-pgs. 724-725), in which a *Mr. Clean* poster was taped to Dane's locker. *This was reported to Mr. Osborne.* (Dane, JA-pg. 725). *Each of these individuals had been previously reported to Petitioner as harassers.* (*Supra* at 11-12, 14-15). Kyle received a verbal reprimand. Jeff received a one day suspension for what Mr. Osborne described as "teasing." (JA-pg. 598). Apparently his verbal reprimand four days before failed to deter his behavior towards Dane; thereby *undercutting the Petitioner's claim of 100% effectiveness in its responses.*

Near the end of the first semester of 9th grade, an incident involving Sabin E. occurred in history class where oral presentations were made by students, using note cards. (Dane, JA-pgs. 707-711). Sabin wrote a series

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[6] Hereafter "Code"

of words on the back of his note cards with the first card designating *"Dane"*, the second *"is"*, the third "a", and the fourth *"fag"*. This act caused intense laughter, humiliating Dane. (Dane, JA-pgs. 708). *Sabin was reported to Counselor Mansfield* (Dane, JA-pgs. 707-711), who called him out of class and told Sabin his action was *possibly sexual harassment.* (JA-pgs. 521-522). Contrary to policy, as referenced above, Sabin was not referred to the principal even though *this was not Sabin's first* incident involving Dane reporting to Petitioner. (Dane, JA-pgs. 669, 673, 675, 703).

During the second semester of this 9th grade year (2005), Dane's main hallway locker was vandalized by students with permanent markers writing such things as *gay*, *fag*, and *queer*, up and down the locker. (Dane, JA-pgs. 712-716). A graphic picture was also drawn, depicting a penis being inserted into a rectum. (David, JA-pg. 805). The inside of Dane's locker was also defaced with writing including *faggot*, *queer*, and *you suck penis* and other similar phrases. (*id.* at 805). Mortified, Dane ran out of the building. (*Id.* at 804-805). This incident was reported to Mr. Durbin. (Dane, JA-pg. 715). School officials cleaned the exterior surface of the locker, after the incident was reported, but failed to clean the interior, leaving Dane and Mr. Adams to clean it (David, JA-pg. 806; Dane, JA-pgs. 712-713). Dane reported hearing that Derrick G. and Kyle M. were the perpetrators. (*Id.* at 714-715). *Kyle M. was also engaging in other acts of teasing and ridicule of Dane over the years,* including the incident of December 14th, 2004. (Dane, JA-pgs. 669, 673, 715-716, 724). (*Supra* at 11-12, 15).

On March 11, 2005, Dane's gym locker was broken into. His clothes were removed, urinated on, and his tennis shoes thrown into the toilet. (Dane, JA-pgs. 726-728). Tyler Walden reported Dane's gym locker was also covered with shaving cream spelling out sexually oriented words. (JA-pg. 152, ¶14). A report was made to Mr. Durbin of a name mentioned by the rumor mill – i.e. Derrick G. (Dane, JA-pg. 727-728).

Later, in the spring of 2005, Dane went to his main hallway locker to find a poster of "Mr. Clean" taped on the locker. (Dane, JA-pgs. 724-726). He reported this incident to Mr. Osborne. (*Id.* at 725-726).

Lastly, Dane was sexually assaulted in the locker room after baseball practice on May 23, 2005. (Dane, JA-pgs. 730-737). The primary perpetrator, Lance, while naked, forced Dane into a corner, hoisted himself up onto Dane's shoulders and took his penis and scrotum and rubbed them against the back of Dane's neck and striking the side of his face with his penis. (*Id.*). A detailed description of the assault is set forth by Dane in the police report. (JA-pg. 260). Lance attended school the Monday after the incident, even though Principal Osborne knew of the assault Saturday morning. (Dena, JA-pgs. 858-859). At the end of the day on Monday, Lance was suspended for the remaining 8-1/2 days of the school year. (Osborne, JA-pg. 596). On June 10, 2005, Lance was charged in the Probate Court with *Assault With Intent to Commit a Felony* and *Criminal Sexual Conduct - 2nd Degree.* (Records, JA-pg. 301). The Petitioner's internal investigation was completed in May, 2005 (Durbin, Appendix-pg. 8a) yet, Lance was not

formally expelled until August, 2005. (Osborne, JA-pgs. 601-603). Dane struggled completing the year after the assault. (See Appendix-pgs. 12a-14a, for more detail).

Another student, Nick H., closed the door and prevented Dane's escape from the locker room during the assault. (Statement of Billy H. JA-pg. 264; Dane, JA-pgs. 731-732). No punishment, as required by the Code, was given to Nick (Code, JA-pgs. 306, 308-309); instead a verbal reprimand was issued. (Durbin, JA-pg. 434). *This incident was not Nick's first with Dane to be reported to the Petitioner.* (*Supra* at 11-12). So severe was this incident that Billy H. Reported in a written statement, that he told Lance, "What are you doing – Dane's going to go off on you someday." (Report, JA-pg. 264).

Petitioner, at the time of the sexual assault, had a policy of supervision in the locker room, which had not been followed for a long of time, (Durbin, JA-pgs. 437-439), and was not followed at the time of the assault. (Dane, JA-pgs. 732-734).

Jeremy Beal, the varsity baseball coach, treated the sexual assault, as a joke. (Walden, JA-pg. 153, ¶24; Wade, JA-pgs. 232-233, ¶22-23). Convening a team meeting of junior varsity and varsity players, Coach Beal, in front of Dane and other players, told players they should only joke with men who can take it – thereby implying sexually assaulting another person was an acceptable manner of joking, if the victim could take it. (Walden, JA-pg. 153, ¶24). Coach Beal also emphatically stated he was not going to start supervising the locker room. (Dena, JA-pgs. 861-862).

The cumulative effect of these incidents, combined with the sexual assault, psychologically and educationally devastated Dane. (See Warwick, JA-pgs. 172-175, ¶19-21, ¶30, ¶32-35, for more details). Dane has not returned to the District or entered a District building since the end of his 9th grade year. (Osborne, JA-pgs. 613-614).

In the aftermath of the sexual assault, Dane's IEP programing was modified to provide off-site home bound services at Sacred Heart Elementary School. (IEP-10th, JA-pgs. 235-247). *This IEP was not successfully implemented.* (Warwick, JA-pgs. 173-174, ¶26-28). After Dr. Warwick pointed out Petitioner's failure to properly implement the 10th grade IEP, the IEPT reconvened and determined that Dane should obtain future credits by attending college courses. (Dena, JA-pg. 198, ¶15; IEP-11th, JA-pgs. 247-258). That program was partially successful in that Dane did not experience bullying or sexual harassment and actually experienced teachers who cared and were concerned about his education. (Dane, JA-pgs. 749-751). However, it has not been without its challenges. (Dena, JA-pg. 198, ¶12-14).

2. History of Reporting

Contrary to the Petitioner's claims, Respondents and Dane, frequently and regularly reported issues and incidents of bullying and sexual harassment. (Opinion, JA-pgs. 323-324; Dane, JA-pgs. 670, 674, 678-679, 697-698, 703-709, 714-717, 724-728, 731-747; David, JA-pgs. 788, 794, 798-799, 805-807). Staff corroborated the extensive reporting by Respondents. (Mansfield, JA-pgs. 505-508, 510-513, 520; Marry, JA-pgs. 534-536; Mason, JA-pg. 561, Adams, Appendix-pgs 2a-5a).

3. School Policy and Its Implementation

At all relevant times Respondent published in its student handbook a mission statement (JA-pg. 274), which recited basic core values. To implement its mission statement, Petitioner adopted certain policies on issues of bullying, harassment and sexual harassment. (Policies, JA-pgs. 275-280). The 2002 policy on *Harassment of Students* stated: "Harassment of students is prohibited, and will not be tolerated." This policy covered student-on-student harassment. *Harassment* was defined as "inappropriate conduct which is repeated enough, or serious enough, to negatively impact a student's educational, physical or emotional well-being." Staff repeatedly characterized the policy as either not allowing harassment or zero tolerance. (Manion, JA-pg. 456; Durbin, JA-pg. 414; Marry, JA-pgs. 538-539). *Sexual harassment*, a sub-category of the anti-harassment policy, is defined to include: a) verbal harassment or abuse, . . . c) repeated remarks with sexual or demeaning implications, . . . e) sexual jokes, posters, cartoons, etc." (Policies, JA-pg. 276)

Petitioner adopted a policy in 2004 on *Bullying And Other Aggressive Behavior Towards Students.* (*Id.* at 277-280), which stated that the board is committed to providing "a safe, positive, productive and nurturing education environment for all of the students," (*Id.* at 277), and stated that "aggressive behavior towards a student, whether by other students, staff, or third party is strictly prohibited and will not be tolerated." (*Id.*). *Aggressive behavior* included "inappropriate conduct that is repeated enough, or serious enough, to

negatively impact a student's educational, physical or emotional well-being," (*Id.*). These policies are set forth in six pages of printed policy materials. Each has a reporting requirement with the bullying policy (*which includes harassment*) requiring reporting to administration. (JA-pg. 277). The six pages are sparsely reflected in the nine pages of the Code. (Code, JA-pgs. 302-310). Eleven lines of those nine pages (1) discussed sexual harassment to include "unsolicited and unwelcome sexual comments and overtures", (2) called it misconduct, and (3) urged reporting to administration. (JA-pg. 304). The definition is not consistent with the one set forth in Petitioner's *Harassment of Students* policy. (JA-pg. 276).

Contrary to Petitioner's claims, staff is not well-trained on these policies. Staff indicated they spent little time training on the specific subjects of harassment, sexual harassment and bullying. Staff varied on the amount of time spent during in-service training on issues of bullying and harassment. Teacher Marry indicated staff training included 15-30 minutes on bullying and another 15-30 on harassment. (Marry, JA-pgs. 543-544). Teacher Mason testified staff spent 1½ to 2 hours on the Code. (Mason, JA-pgs. 566-567). Andy Wade had no training. (Wade, JA-pgs. 228-230, ¶9). These are just a few examples of the inconsistencies of staff members regarding the amount of time spent reviewing the Code and policy in relationship to bullying, harassment and sexual harassment.

Discovery confirmed inconsistent understanding by staff of issues of harassment, sexual harassment, and bullying. Comments included:

1. Media Director Bunting testified: (a) *bullying* is a student invading the space of another student, which regularly occurred at Hudson; (b) *harassment* as the same thing as bullying; (c) she handles bullying informally; (d) name calling, such as *gay, fag, faggot, queer* and *lesbian* is a frequent occurrence at Hudson; (e) she has personally observed students shoving other students in her classroom and in the hallways; (f) she rarely spends more than five minutes total in the hallways during any given day; (g) she indicated "students will be students" thereby minimizing the significance of these events. (JA-pgs. 357-360).

2. Teacher Manion testified: (a) *bullying* is giving another person a tough time in order to demean them; (b) *harassment* is the same as bullying; (c) she has seen incidents of bullying over her years at Hudson; (d) she has heard name calling (*gay* and other sexually graphic names); (e) she has her own standard of discipline for these things, which did not include a formal write up and office notification. (JA-pgs. 445-450).

3. Counselor Mansfield testified: (a) she could not specifically define *bullying* because it included a complex set of parameters; (b) being called *fat, fag*, and *gay* on a regular basis was considered bullying; (c) physical violence constituted bullying

or harassment; (d) being jostled or shoved into a locker on a regular basis would be deemed harassment; (e) being called *gay, fag, faggot* or *fat pig* is harassment; (f) sexually oriented graphic content painted on a locker is harassment, as is urinating on a person's clothing or throwing gym shoes in a toilet. (JA-pgs. 499-504). In the context of staff preparations for a school year, sexual harassment was discussed, but not as a formal agenda item at staff meetings, and was only covered in general terms. (*Id.* at 502).

4. Teacher Marry testified: (a) *bullying* occurs "when anyone touches or makes another student feel unwanted or uncomfortable in my classroom and interferes with my teaching", and (b) sexual harassment is worse. *Responses to such incidents are left to individual teacher's discretion.* (JA-pgs. 538-539).

5. Teacher Mason testified: (a) *teasing* is intentionally saying things to hurt another person's feelings; (b) *bullying* is intimidating someone with words or actions; (c) *harassment* is repeatedly intimidating another person; (d) she has heard students use the terms *fag, gay, faggot* and *queer* in the school environment. *When confronted with those issues, she refers students to Counselor Mansfield, not administrators.* (JA-pgs. 562-564).

6. Teacher Adams informed Angela Johnston that the District did not have a consistent and formal

> plan to deal with bullying, nor the support of the administration to respond to these issues. (Johnston JA-pg. 158, ¶18-22).

These comments reveal *teachers did not have a uniform understanding of Petitioner's Policy* on "harassment", "sexual harassment", and "bullying", nor had consistent responses towards said behaviors. This issue is reinforced by the Affidavit of Andrew Wade, (Wade, JA-pgs. 227-230, ¶7-9), who stated, as a coach and as a permanent substitute teacher, he received no training at all on these issues. *This evidence contradicts Petitioner's assertion that staff is well-trained.* Staff did not recognize the mandatory requirement of the policy on bullying to report matters to an administrator. *Supra* at 14-16 (Mansfield), 22 (Bunting, Manion), 23 (Marry, Mason).

Students also were not uniformly and consistently instructed on issues of bullying, harassment and sexual harassment. Assistant Principal Durbin testified that the Code was presented to students annually at an assembly or conducted grade-by-grade, said manner having been used for years. (Durbin, JA-pgs. 428-429). Teacher Marry indicated that the Code was disseminated by teachers on the first day of each academic year as part of first period and, *if time permitted*, was reviewed with the students. He allocated between 1-45 minutes to discuss the Code, "time permitting". (JA-pgs. 540-542). Teacher Mason indicated that she spent 20-25 minutes on the first day of class each year discussing the Code (JA-pgs. 565-566).

Students contradicted staff regarding presentation of the Code. Sara Dempsey stated teachers would read the student handbook, but not explain the terms or the material. (JA-pgs. 133-134, ¶6). Ryan Hobbs indicated teachers did not go over the Code, but rather sent the handbook home with them. (JA-pg. 138, ¶9,). Emily Kline, in 13 years of attendance at Hudson, remembered only two occasions when teachers reviewed the Code with her class and only by reading it without explanation. (JA-pg. 145, ¶10).

As to issues of harassment in the environment, Assistant Principal Durbin testified, (Durbin, JA-pgs. 415-421, 424-427): (a) *harassment* is continuous and repeated acts of a negative nature; (b) core values of Hudson are violated by bullying, harassment and sexual derogatory name calling; (c) sexually oriented language could undermine core values, if the student doesn't feel safe; (d) sexually derogatory name calling is a violation of core values; (e) repetitive name calling of *gay*, *fag*, etc., directed towards someone violates core values; (f) pushing and shoving someone in the hallways and into lockers violates core values; and (g) for discipline to be effective it must be consistent and fairly applied. Mr. Durbin acknowledged that he was personally aware of students that did not feel safe at school (*Id.* at 418), which was supported by Sarah Dempsey. (JA-pg. 134, ¶13-14).

Glen Stutszky, Respondent's expert on school abuse, bullying and harassment, opined Petitioner was not proactive in addressing bullying and harassment and also lacked understanding of the condition and environment as to these issues. (Stutzky, JA-pgs. 283-

286, ¶7-8). Bonnie Dunn acknowledged Mr. Stutszky as a leading expert in this field. (Dunn, JA-pg. 386). Proactive methods, *which are essential in combating a hostile environment*, were not implemented in this District. (Dunn, JA-pgs. 385-386, 398-404; Stutzky, JA-pgs. 283-285, ¶7-8). Petitioner has no expert to contradict Mr. Stutzky.

Counselor Mansfield testified, (JA-pgs. 485-494): (a) for the 2002-2003 school year, the counseling department (with her efforts) conducted an all school survey which included issues of bullying, harassment and sexual harassment, to obtain a feel for the environment and determine how to allocate counseling resources; (b) the survey revealed feelings throughout the student body of a need for counseling services relating to areas of bullying and sexual harassment; (c) to address issues of bullying and harassment, she suggested programs to address these issues by raising awareness; and (d) these items needed to be part of a proactive approach. *Her proposed proactive plan related to bullying, harassment, and sexual harassment was rejected by Superintendent Malnar*, who did not believe they would do any good. Immediately thereafter, her department staff was cut and she was unable to implement any programs.

Bonnie Dunn was hired, *after the sexual assault upon Dane*, by the District as a Community and School's Coordinator. She conducted a student survey at the beginning of the 2005-2006 academic year, specifically related to bullying. (JA-pgs. 391-392), which revealed the following results: (a) Petitioner continued to have a bullying issue which needed to be addressed;

(b) students perceived bullying as a problem, that there was not a consistent disciplinary response to these issues, and that nothing would be done about it. She also indicated: it takes years of effort to combat the effects of teasing, taunting and harassment and to break the cycle of those activities (*Id.* at 401); Petitioner needed to implement a formal school wide proactive anti-bullying program, uniform from grades K-12 to effectively combat bullying and harassment (*Id.* at 385); a consistent disciplinary policy in response to bullying, harassment and teasing was necessary to successfully combat these things (*Id.* at 406-407); and lack of a consistent disciplinary policies created an impression within the student body that undermines efforts to deal with bullying and harassing (*Id.* at 407).

REASONS FOR DENYING THE PETITION

The Sixth Circuit Opinion is based on a lucid analysis of the facts and procedural rules regarding summary judgment review, does not conflict with any decision of this Court nor any Court of Appeals, and is not impractical. Petitioner cites to several "undisputed" facts, which have been properly disputed by the Respondent. In its Opinion, the Majority correctly drew all reasonable inferences in the Respondent's favor. The Majority was also consistent with existing precedent and ruled that several persuasive cases touted by Petitioner as factually analogous were distinguishable. Petitioner also made no attempt to distinguish a persuasive case that the Majority described as "strikingly similar." Lastly, Petitioner argues that by correctly following summary judgment standards and remanding a case with material issues of fact back to trial, the Majority's

decision is impractical and will open the floodgates of litigation against school districts. This argument is without merit because the Majority's holding did not find liability against Petitioner, but rather correctly stated that under the present facts, the case should proceed to trial, a decision which does not set impractical standards. Accordingly, it is not appropriate for this Court to grant certiorari, nor has Petitioner carried their burden of demonstrating any "compelling reasons" for the Petition to be granted. See Sup. Ct. R. 10.

I. The Majority Below Contains a Lucid Analysis of Facts and Procedural Standards Regarding Summary Judgment Review

The Sixth Circuit Court of Appeals, in *Patterson*, 551 F.3d at 444, cites the correct standard for reviewing summary judgment. The Court is to review all the evidence and "draw all reasonable inferences in favor of the nonmoving party." *Crawford v. Metro. Gov't of Nashville and Davidson County*, __ U.S. __, 129 S.Ct. 846, 850, FN1, 172 L.Ed.2d 650 (2009) (citations omitted). It must also determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). This Court has determined that a dispute over a material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248.

Respondent has outlined in detail many disputes of material fact presently existing in this case. *Supra* at 2-

27. The Majority noted several disputes of material fact. *Patterson*, 551 F.3d at 446, FN 6, (use of the resource room and Mr. Adams); see also *Id.* at 450, FN10, (Petitioner's "proactive" measures of dealing with harassment). The Majority correctly viewed the evidence in the light most favorable to Respondents, and even chastised the Dissent for weighing conflicting evidence in the moving party's favor. *Id.* at 445-446, FN6.

Lastly, while the Majority correctly dismissed the Dissent's "100% effective" argument, the Majority focuses on the harassment Dane suffered in the 9th grade alone. When considering the previous years of reported harassment, it clearly shows that Petitioner's responses were not 100% effective against individual harassers, but that Petitioner had notice some students who harassed Dane in 6th and 7th grade also harassed him against in 9th grade. *Supra* at 11-14. Given the many disputes of fact in the present case, precedent compels the Court to draw all reasonable inferences in favor of Respondents. The Majority correctly applied this standard and found summary judgment was inappropriate pending resolution of those factual issues.

II. The Majority Correctly Follows Controlling Case Law

Petitioner asserts the Majority conflicts with this Court's opinion in *Davis*, 526 U.S. 629, and its "progeny". Under *Davis*, a plaintiff must show the following elements to establish a *prima facie* case of student-on-student sexual harassment under Title IX:

(1) the sexual harassment was so severe, pervasive, and objectively offensive that it could be said

to deprive the plaintiff of access to the educational opportunities or benefits provided by the school;

(2) the funding recipient had actual knowledge of the sexual harassment; and

(3) the school was deliberately indifferent to the harassment.

Davis, at 653. The relevant inquiry at the Sixth Circuit was whether Petitioner acted with deliberate indifference.

"[T]he deliberate indifference must, at a minimum, cause [students] to undergo" harassment or "make them liable or vulnerable" to it. *Id.* at 645 (citations omitted). While the respondent in *Davis* contended that expulsion should be required for every student accused of sexually harassing another, the Court rejected the idea that a district must purge "their schools of actionable peer harassment or . . . engage in particular disciplinary action." *Id.* at 648. Indeed, the Court noted that "[s]chool administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed 'deliberately indifferent' to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Id.*

Respondents agree a district does not have to purge or eradicate peer harassment, but, is liable for such harassment when its response or lack of response is clearly unreasonable in light of the known

circumstances. *Davis*, 526 U.S. at 648. Therefore, a school district must "*merely respond* to known peer harassment in a manner that is not *clearly unreasonable.*" *Id.* at 648-649 (Emphasis added).

A. The Majority Does Not Conflict With *Davis* Nor *Vance*

In forming its ruling, the Sixth Circuit relied on its decision in *Vance*, 231 F.3d 253. *Vance* correctly cited to and analyzed the facts of that case under the *Davis* standard described above. *Id.* at 260. The Sixth Circuit also asserted that

> where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.

Id. at 261. By this statement the Sixth Circuit rejected that Spencer County's argument that "as long as a school district does something in response to harassment, it has satisfied the standard." *Id.* at 260. This language in *Vance* is consistent with the holding in *Davis*; in both cases, the respective districts failed to change their remedial action despite continued harassment against a student.

Petitioner makes a three-fold argument that the Majority conflicts with existing precedent: (1) that multiple cases suggest that any mere response satisfies the *Davis* standard; (2) that certain language in the *Vance* holding does not apply to this case because the harassment suffered by Dane was not as "egregious" and *Vance* is, therefore, factually distinguishable; and (3) that the Majority's Opinion requires schools to "remedy" or "purge" themselves of sexual harassment to survive at the summary judgment level.

First, as the Sixth Circuit Opinion clearly noted, *Vance* rejects the notion that any response satisfies the *Davis* standard. *Patterson*, 551 F.3d at 448. Cases cited by Petitioner for this proposition are clearly distinguishable: (1) *Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1121-24 (10th Cir. 2008) (issues of reporting the harassment and the school deferred to police because it believed the incidents happened off school grounds); (2) *Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380 (5th Cir. 2000) (involved sexual harassment of a student by a teacher); (3) *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 174 (1st Cir. 2007) (involved harassment by one student, who rejected the allegations and was found credible by the administration and the; (4) *Bd. of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 407 (1997) (pre-*Davis* standard); (5) *Wilson v. Beaumont Indep. School Dist.*, 144 F.Supp.2d 690 (E.D. Tex. 2001) (distinguished at *Patterson*, 551 F.3d 449, FN 8); (6) and *Johnson v. Independent Sch. Dist.*, 194 F.Supp.2d 939, 948 (Dist. Minn. 2002) (also distinguished at *Patterson*, 551 F.3d 449, FN 8).

Furthermore, as noted by the Majority, Petitioner does not attempt to distinguish analogous case law with unfavorable rulings, specifically *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F.Supp.2d 952, 966 (D. Kan. 2005), which the Majority appropriately found persuasive and "illustrative" because of the "striking similarities" between the cases. *Patterson*, 551 F.3d. at 446-449. Other persuasive cases suggest certain failures by a school district may constitute deliberate indifference. *Murrell v. Sch. Dist. No. 1, Denver, Col.*, 186 F.3d 1238, 1249 (10th Cir. 1999); *Morlock v. West Cent. Educ. Dist.*, 46 F.Supp.2d 892, 909-910 (D. Minn. 1999); *Montgomery v. Indep. School District No. 709*, 109 F.Supp.2d 1081, 1095 (D. Minn. 2000); *Schroeder v. Maumee Bd. Of Educ.*, 296 F.Supp.2d 869, 880 (N.D. Ohio 2003).

There is sufficient case law to contradict Petitioner's assertion that any response is enough to satisfy the *Davis* standard. The persuasive authority cited by Petitioner is not controlling nor is factually analogous. Indeed, *Davis* alone contradicts this assertion – a district's mere responses must not be clearly unreasonable. *Davis*, 526 U.S. at 648-649.

Second, Petitioner attempts to narrowly construe the *Vance* holding as applying only to cases with a similar factual background, i.e., that offending students must re-offend, and the school district must continue to repeat the same ineffective responses to those offenders to create an issue for the trier of fact as to what is clearly unreasonable. Neither *Davis*, *Vance*, nor any post-*Vance* authority asserts this proposition. Instead, *Vance* rejects a minimalist response to known severe,

pervasive, and objectively offensive harassment against a student. *Id.* 231 F.3d at 260. Even if the Petitioner's standard would apply, which Respondent challenges, the evidence in this case suggests that the Petitioner did repeat ineffective responses against know offenders. *Supra* at 11-14.

Further, the Dissent and Petitioner recite, but misstate, several key facts in *Vance*. The facts, identify several offenders from November 1992 to August 1995, only some of which were re-offenders. *Vance*, 231 F.3d at 256-258. The Sixth Circuit, cited to three instances that showed Spencer's deliberate indifference, none of which involved a re-offending student. *Id.* at 262. After referencing these instances, the Sixth Circuit noted "in numerous instances, Spencer continued to use the same ineffective methods to no acknowledged avail." *Id.*

Third, Petitioner misconstrues the Majority's holding by focusing on the use of the word "prevent" without providing the correct context for that word. "As explained above, Hudson's success with individual students did not prevent the over-all and continuing harassment of DP, a fact of which Hudson was fully aware, and thus Hudson's isolated success with individual perpetrators cannot shield Hudson from liability as a matter of law." *Patterson*, 551 F.3d at 449. Previously, the Majority had outlined the *Vance* framework as to what is unreasonable. "We believe this language makes clear that, even though a school district takes some action in response to known harassment, if further harassment continues, a jury is not precluded by law from finding that the school district's response is clearly unreasonable." *Patterson*, 551 F.3d at 448. In

other words, the Majority states, citing *Theno*, 377 F.Supp.2d 952 as persuasive authority, that continuing harassment against a student puts a school district on notice that its responses to said harassment may not be effective, thus creating a potential triable issue of fact as to whether or not the responses were clearly unreasonable. In the present case, the trier of fact is also required to determine what responses Petitioner actually implemented to combat the sexual harassment against Dane. *Patterson*, 551 F.3d at 446, FN 6. Thus, the Majority correctly followed the relevant and binding authority.

B. The Majority Below Is Not In Conflict With The Third Circuit, As *Doe v. Bellefonte Area School Dist.*, Is Factually Distinguishable

Following the drum of the Dissent, Petitioner has touted *Doe v. Bellefonte Area Sch. Dist.*, 2003 WL 23718302 (M.D. Pa. Sept. 29, 2003), *aff'd* 106 Fed. Appx. 798 (3rd Cir. 2004) as having "substantially similar facts." In *Doe*, the district court set out the pertinent facts at 2003 WL 23718302, *2-6. The facts showed that Doe suffered systematic verbal sexual harassment with multiple offenders over a period of several years. The facts also showed questions regarding Doe's reporting, and Doe's willingness to accept the district's methods of responding to the harassment.

Over the years, the responses to the harassing students varied: (1) a two day suspension with two detentions; (2) keeping a student apart from Doe; (3) a verbal warning in the face of a denial from the offending student; (4) moving Doe and his friends to a different

study hall; (5) a verbal warning to a student who harassed Doe two years prior; (6) a detention; (7) an apology with a full day detention; and (8) a three-day suspension along with a detention for Doe after he traded insults and sexually harassing words with another student. *Id.*

Responses in addition to disciplining offending students included: (1) four memoranda circulated to teachers regarding Doe's situation and sexual harassment; (2) a gym-class discussion on name-calling; (3) a meeting with Doe, Doe's parents, and school administrators; (4) the offer of a hallway "buddy" for Doe; (5) placing Doe on the "Anti-harassment Committee"; (6) allowing Doe special procedures to report harassment not given to other students; and (7) policies, assemblies, and speakers specifically addressing harassment. *Id.*

The present case and *Doe* are factually distinguishable. As noted by the Majority:

> *Doe* . . . is different from this case in two material respects. First, in *Doe*, the school district did more to prevent the systematic harassment of Doe than Hudson did in instant case. Specifically, the school district gave Doe "a special means of reporting any additional harassment," circulated memoranda specific to Doe's harassment issues to the faculty in hopes of preventing future harassment, and "held assemblies and enacted policies addressing peer-to-peer harassment." *Doe*, 106 Fed. Appx. at 800. As outlined above, when

> viewing the facts in the light most favorable to the Pattersons, we observe that Hudson did not perform any of these services during DP's night-grade year. Thus, Doe is distinguishable from the instant case by the effort the school district devoted to preventing future harassment.

Patterson, 551 F.3d 448, FN 7. Secondly, the Majority noted that *Doe* neither cites to nor is bound by *Vance*, rebutting the Dissent's contention that *Doe* tacitly rejected the Majority's interpretation of *Vance*.

Lastly, it should be noted the school policy in *Doe* gave the district the discretion to choose the punishment for harassing students. No punishments were mandated. It appears that as the verbal harassment against Doe continued, the *Doe* district moved from verbal warnings to tougher punishments, culminating into two punishments for the reported incidents in Doe's final year: an apology and a full day suspension for a student who yelled "[Doe] is sexy" out of a classroom window, and a three day suspension for a student with whom Doe traded sexually harassing insults. *Doe*, 2003 WL 23718302, at *5.

In summary, even though harassment continued from new offenders, the *Doe* district did not just repeat the same ineffective responses. The *Doe* district increased the severity of the punishment for offending students and attempted other means at addressing the harassment issue.

III. The Majority's Opinion Is Not Impractical, Rather Is Based On Sound Logic

Petitioner warns that the Majority, in effect, opens the floodgates of litigation because it sets nearly impossible standards and schools must now "prevent" future harassment by unidentified harassers. Again, Petitioner misconstrues the Majority's holding.

As stated by the Sixth Circuit Majority,

> [w]e emphasize that, at this state of the litigation, the Pattersons are not required to prove that Hudson is actually liable for the continued harassment of DP (i.e., that Hudson's actions were clearly unreasonable), but only that there is a genuine issue of material fact as to whether Hudson was deliberately indifferent to the harassment.

Patterson, 551 F.3d at 450.

The Third Circuit, in the previously analyzed *Doe v. Bellefonte Area School Dist.*, states an identical standard: "[w]e agree with the District Court that Doe failed to adduce evidence to create a germane issue as to whether the actions taken by the School District in response to the allegations were clearly unreasonable and therefore that the School District could not have been found deliberately indifferent." *Doe*, 106 Fed.Appx. at 799.

The difference in the facts led to the determination. In *Doe*, the court found no genuine issue of material

fact which suggested the district's responses were clearly unreasonable, thus the district, as a matter of law, could not be found to be deliberately indifferent. In the present case, the Sixth Circuit found that genuine issues of material fact existed, thus Petitioner could not be shielded from liability as a matter of law.

While the Sixth Circuit did not impose liability against Petitioner, it allows for the possibility of a jury to do so. Petitioner bootstrapped to its argument confidential settlement offers between the parties in attempt to show the potential cost to Hudson. This settlement offer has not been made part of this record, thus is not properly before this Court. To suggest that the Sixth Circuit's Opinion automatically creates or imposes some financial liability on school districts misconstrues the holding. With the present facts, there is a genuine issue of material fact as to Petitioner's deliberate indifference, because despite continuing harassment against Dane, Hudson implemented the same responses, refusing to comply with their own policies and procedures, and refusing to attempt any alternative means of dealing with the harassment. This is in direct contrast to the actions of the school district in *Doe*. Thus, the Sixth Circuit's Opinion changes nothing, because it conforms with precedent established in *Davis* and *Vance*, and also recognizes persuasive authority from other districts.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Respondents respectfully request this Petition be denied.

Respectfully submitted,

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APPENDIX

Excerpt of Deposition of Ted Adams - November 7, 2006, filed in district court

Transcript - Page 10:

Q. Describe the Pattersons as parents.

A. The Pattersons are supportive parents. They like to be communicated with to know the status of their students' education. I'm speaking from an educator's standpoint now right now.

Q. Sure.

A. .....Supportive, and follow through when asked to do something, and they in turn have communicated things to me that they would like followed up on.

Q. Such as what?

A. Primarily academic issues, missing assignments, slipping grades, those kind of things.

Q. Have you ever thought to yourself or expressed to anyone a belief or a feeling that the Pattersons are too involved in their children's education?

A. I have never expressed that.

Q. Do you think that they are appropriately involved in their children's education?

A. From my perspective, when I have asked them to follow up on things, and when they have asked me to follow up on things, we get it taken care of in the best interests of the children

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Transcript - Page 11:

.....

Q. And they have offered themselves to be available to help accomplish a good education

for their children?

A. Yes.

.....

Q. They have asked questions of you as to what they can do as parents to help their children's education process?

A. Yes.

.....

Q. And you have given them suggestions, and they have been able to follow through on those?

A. Yes.

Q. Okay. I'm just trying to make sure I understand what you are saying. Do you socialize with the parents outside of school?

A. We haven't had much opportunity to do that. We have had occasion at Science Olympiad events to have conversations, but –

.....

Transcript - Page 16

.....

Q. Okay. Do you remember, as part of the MET review or the MET evaluation and the subsequent IEP team determinations, what the issues were for Dane that was part of his emotional impairment?

Transcript - Page 17:

A. Dane -- as I remember, Dane was having difficulties with some interpersonal relationships with his peers, and his academics were suffering. The grades were lower than what they had been previous to that.

.....

Q. Do you recall at any point in time discussing with Dane or his parents names of sexually

derogatory nature being called or pointed to him, like fag, gay, fat pig, things of that nature?

A. I remember just having conversations with his parents about that, yes.

Q. Okay. Did Dane ever discuss those kinds of things with you or how he was feeling about his peers?

A. I don't recall him directly conversing with me on that, no. On a day-to-day basis we dealt with fluctuations in how he was feeling, mostly about academics though.

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Transcript - Page 28:

.....

Q. In your opinion, how did Dane handle that?

A. Gradewise, I had a lot of communications with the parents when things were not what I was comfortable with, what I thought they needed to be, what I thought they would want them to be, and we were able to pull it together, and he was able to put more effort into some of the areas that maybe he had let slide for a little while.

Q. Did anxiety affect his school performance?

A. I think anxiety affects a lot of students' performance.

Q. Okay.

A. It may have had a factor in Dane's academic performance.

Q. Was some of his anxiety related to his peer issues in that 9th grade year?

A. I think some anxiety may have been brought on by negative interaction with peers.

Q. In fact, you letter references several incidents

throughout the year that caused some setbacks, the top of page two; right?

A. Specifically I was involved with the planner incident.

Q. What was the planner incident?

A. Dave Patterson had contacted me and was concerned that

Transcript - Page 29:

Dane -- someone had graffitied in Dane's planner, written some derogatory remarks. I can't recall what they were at this point in time. So I instructed Dave to come in, and he brought some of the pieces of the planner that had been removed I believe, and he also said that Dane had -- I'm trying to remember -- Dane had not brought all of them home, but there was some of them home. So Dave brought them in. I wasn't comfortable with doing anything about that situation from a disciplinary standpoint. So I went and we found Mike Osborne and showed him the pages of the planner and took the information that Dave had at that point in time, that Dane had shared with him, took the information that Dane had shared, and I think at that point in time I don't think there was any more involvement on my part with the subsequent follow-up investigation and those kind of things.

Q. Were some of the things written that you said were derogatory, were they things like gay, fag, queer, those kind of things?

A. I don't remember seeing those specific things written on the pages. Like I said, I saw one page, and I don't remember what was written on

that. And Dane had maybe crumpled up the other pages and did not share them immediately with Dave Patterson, and I don't know if they came up later or not.

Transcript - Page 30:

Q. Apparently the page that you saw was disconcerting enough that you sought out Mr. Osborne?

A. I don't remember what exactly was said on there, or the fact that Dave had contacted me, and I was going to follow up to the best I could and act as a liaison there, to make sure it got to who could deal with that situation the best.

Q. did Dave Patterson come in with names of alleged perpetrators?

A. I believe that he did, yes, because I recall Mike Osborne getting those names.

Q. Okay.

A. I don't remember who the names were, but --

Q. Okay. Did you find out later if any disciplinary action had been taken as to those students?

A. Usually directly I don't get, because I did not write a referral or anything. That was something that Mr. Osborne handled. I didn't have any direct knowledge of what might -- what consequence might have taken place.

Q. Okay. Do you remember any other incidents that you were referring in your letter?

A. Well, one incident Dane did come to me that someone had written something on the outside of his locker, and so I called the custodial staff, and someone went down immediately or very soon after and cleaned off whatever it

Transcript - Page 31:

was. I don't think that I ever actually saw what was written on the outside of his locker, but I applauded Dane for coming to me to have it taken care of.

Q. It says: Dane utilized me as a resource when students defaced his locker with sexual slurs. So you didn't actually see the language, or was that reported by Dane?

A. I believe that would have been reported by Dane.

Q. Dane remembers you going down third period and helping take that off, because janitorial staff hadn't gotten around to that yet. Do you remember that?

A. I don't remember that specifically. It -- I can't -- can't confirm that one. But that does sound like something I would do.

.....

Transcript - Page 37:

Q. Okay. And you are aware of the sexual assault that Dane experienced his 9th grade year?

A. Yes. Dena Patterson shared that with me.

Q. When did you first hear about it?

A. It was near the end of Dane's 9th grade year, in a phone conversation that I had with Dena.

Q. Now, it says here: When Dane is frustrated he turns his anxiety inside himself. His frustration is manifested in not completing work consistently and withdrawing from activities. That's your experience with Dane, that as he gets frustrated, he tends to become hard on himself or go inside himself?

A. Those are things that we had discussed at the

IEP and shared.

Q. and is that consistent with what you have observed of Dane as well?

A. That see ms to be a consistent pattern with Dane, yes.

Q. And Dane does not act out his frustrations. So most of the time it goes inward is what you are saying there? He's not a behavior problem as a result of his anxieties and frustrations?

.....

Excerpt of Deposition of Bonnie Dunn - December 4, 2006, filed in district court

Transcript - Page 2:

.....

Q. Bonnie, I understand that you are employed by the Hudson Area Schools. Is that Correct?

A. Yes, I am.

Q. What is your job capacity?

A. Communities and schools coordinator....

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Transcript - Page 4:

Q. And when did you start that position?

A. Last year, the beginning of the '05 school year.

Q. So the '05-'06 year?

A. Right

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Excerpt of Deposition of Thomas Durbin - December 4, 2006, filed in district court

Transcript - Page 79:

.....

Q. Turning back to Mr. Patrick a minute, when was the investigation for your part completed?
A. I believe it was completed within that day or within the next half day.....
Q. Do you know when the entire investigation was completed by Mr. Osborne or anyone else?

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Transcript - Page 80:

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Q. So by the time Mr. Patrick had been suspended, would the investigation have been completed?
A. The initial investigation, yes.

.....

Transcript - Page 81:

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Q. Did there come a point in time when Mr. Osborne came to you and said he had finished his investigation and determined what to do what, if anything else, to do with Mr. Patrick?
A. Yes. I believe he came to me and said this is how he saw it at the time, and that he was investigating whether it was a criminal sexual conduct or not.
Q. And that would have been also in that week that you had first learned of it?
A. In that first week? I don't remember the time frame.

Transcript - Page 82:

Q. Certainly by the time school was out?
A. As far as the school year?
Q. Yes.
A. Yes.

Excerpt of Deposition of Dena Jean Patterson – October 26, 2006, filed in district court

Transcript - Page 121:

Q. ..... Do you recall what the purpose of the referral was? Was it bullying issues or was it anxiety?

A. It was about overall I needed to know where he's at. You are talking about two parents who are hanging by a thread and we're trying to see what he could do in the school environment to get him through this school year to where he will come back the next year.

Q. Was there a specific reason that you cited for the referral in your request?

A. I just told you, I know – I needed to – he was having rouble academically. I already knew emotionally he had issues. I didn't need the school to clarify that. Once I mentioned it to the social worker did assess.

Transcript - Page 122:

Q. Which social worker are you talking about?

A. Tammy Cates.

Q. The meeting with Tammy Cates though was in the summer after the referral, correct?

A. Tammy Cates took up upon herself to test Dane. She did a simple assessment if you will...It was an assessment that she ended up coming to – she approached David and I and said that on this particular form the only thing that Dane didn't admit to is Dane trying to kill himself. She was very concerned. She thought it was a good idea that we were pursuing the testing.

This was a simple little – some kind of assessment...

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Transcript - Page 136:

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Q. Are you meaning throughout the summer also?

A. No, no. I didn't make myself clear. I'm sorry. I was stating that Mr. Adams was working so hard that we were disappointed at the next IEP. As you know you have the IEP's at the end of the year, same school year, so at the end of eighth grade is when he had the IEP for next year. That's when we were told we couldn't continue with Mr. Adams.

Q. Who told you you couldn't continue with Mr. Adams?

A. Mr. Mike Osborne, the principal at the high school.

Q. My understanding is though that Dane did continue with Ted Adams in ninth grade.

A. On a consulting basis, it was 20 to 30 minutes per week. He was not allowed to stay on as a resource room capacity because he was only a middle school.

Q. So you wanted Dane to continue with Ted Adams on the same basis as eight grade?

A. We begged.

Q. In your Answers to Interrogatories here you stated

Transcript - Page 137:

that "We decided not to place Dane with another high school resource room teacher." Was it just Mr. Adams – Mr. Adams is the only high school resource room teacher; isn't that correct?

A. No. He's only middle school...We were disappointed at the end of that school year at the IEP when Mr. Michael Osborne, the principal stated...first of all we said we want to have Mr. Adams, obviously Mr. Adams will be the study skills for Dane; right? And he said no, Mr. Adams is the middle school resource room teacher. We begged, even if Dane doesn't mind coming in with eight graders could he come in and still use Mr. Adam for resource room because this was working...We asked – we begged and then first thing he said, well, you can't pick...

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Transcript - Page 138:

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But at the end of the day he said Mr. Adams definitely couldn't be Dane's resource room teacher because he was the middle school.

So then we were faced with the choice of putting him in the other resource room which had the EI kinds in. Everyone at the table, Mr. Osborne included, didn't think that was the place for Dane.

Q. Was that you included, you didn't believe that was the place for Dane?

A. ...I was depending upon the professional there at the table. Mr. Adams, Mr. Osborne, all of the professionals at the table were stating that that EI resource room they would have concerns...But it was very clear that they didn't think that was the place.

So again the options, Mr. Osborne said, well – and obviously I think it says 20 to 30

minutes per week...And I would rather take Mr. Adams 20 to 30 minutes than not have anybody at all. So we have already eliminated the EI resource

Transcript - Page 139:

room isn't the place, that was option A.

The other option B is to take – because Mr. Adams – the way Mr. Osborne put it was that Mr. Adams was willing to basically do this and the school was allowing them – allowing him – to do it and act in that capacity. They would put it down for I believe 20 to 30 minutes per week but it would be on like a consultant basis; not as a resource room teacher. It could have been listed as resource room and I thing it is but it's very minimal.

Q. Okay. So you ultimately decided that youdidn't want Dane with another high school resource room teacher; is that correct"

A. Yes. From what the team decided. I don't think that was an ultimate decision of David and mine....

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Transcript - Page 157:

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Q. And a meeting was set up for the next morning; correct?

A. Yes, sir, at 9:00 a.m.

Q. You appeared at the meeting, correct?

A. Yes, sir.

Q. Your husband was not there; correct?

A. No. At that point Dane couldn't be left alone at home, so he stayed home with Dane while I attended the meeting.

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Transcript - Page 158:

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Q. So Dane ended up coming to school around 11:30 if I'm remembering correctly?

A. Yes, sir.

Q. And he ended up meeting with Mr. Osborne, is that right?

A. Yes, sir. After we brought him in, yes, sir.

.....

Transcript - Page 159:

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Q. Okay. Did Dane stay at school the rest of the day to the best of your knowledge?

A. The last whatever couple of hours were left in the day.

Q. Just for general knowledge how long did the school day last?

A. ...I thing it was like 8:00 to 3:00, something like that, ball park.

Q. All right. .... So after that Monday was there any resolution?

A. Well, we were – Monday David and I made sure we were available after school to where the baseball field is locates where we could keep Dane in our sight. It was at first Dane didn't want to play anymore but he also knew that everyone on the team – we knew that Lance – at least Lance would be kicked off the baseball team. It happened at a baseball practice, so we're assuming that he would be at least kicked out of baseball. So Dane knew if he didn't play the team would end up forfeiting the rest of their season and that was

a real concern for Dane because then he said the rest of the kids...

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Transcript - Page 164:

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So on then on Wednesday we're still trying to get Dane through the week with getting there half days, some days in the afternoon, some days in the morning. Because he was told that if he – he was expected to come back to school obviously. By Tuesday he had had a couple of kids approach him about telling him that he better watch his back, there were kids that wanted to kill him.

Q. Was there a report to the school do you know?

A. Reported that to Mr. Osborne and Mrs. Mansfield....